IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1196

RICHARD SHERWIN and RONALD CORYELL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above case on October 21, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is as yet unreported. A copy of said opinion is set forth in Appendix "A" hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 21, 1977. A Petition for Rehearing was timely filed and was denied on January 24, 1978. A copy of the Order denying the Petition for Rehearing is set forth in Appendix "B" hereto. This Court's jurisdiction is invoked under Title 28, United States Code §1254(1).

QUESTIONS PRESENTED

1. Does a standard of *scienter* which authorizes obscenity convictions on mere knowledge of the "sexual orientation" of material impermissibly chill the dissemination of expression protected under the First Amendment of the United States Constitution?

2. Did the introduction into evidence of illegally seized publications prejudice the jury herein and affect its determination on the issue of *scienter* as well as its general determination of obscenity?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

"Congress shall make no law. . .abridging freedom of speech or of the press."

STATEMENT

Petitioners herein were charged with conspiracy and substantive counts of interstate shipment of obscene material in violation of Title 18, United States Code §§1462, 1465 and 371. It was the Government's theory at trial that certain allegedly obscene magazines moved in interstate commerce from Durand, Michigan to Los Angeles, California in February and March of 1976, and that petitioner Coryell, in Durand, Michigan, and petitioner Sherwin, in Los Angeles, California, conspired to cause and did cause those shipments.

At trial in the United States District Court for the Central District of California, the Government introduced into evidence the publications charged, which had been seized by federal agents in the execution of two search warrants. The introduction was over objection since the defense contended that the warrants were obtained in the absence of probable cause and further that, in executing the warrants, the federal officers exceeded the authority conferred on them by said warrants and seized items not described therein.

The warrants authorized only the seizure of records and documents reflecting the shipment of a magazine entitled "Private No. 8" in interstate commerce. In executing the warrants, however, the officers seized numerous other items, including other magazines which were ultimately charged against petitioners. Among the publications so seized were issues of "Color Climax No. 3" and "Color Climax No. 4." The District Court denied the motion to suppress and both petitioners were convicted of violations of Title 18, U.S.C.

§§1462 and 1465, based upon the interstate shipment of "Color Climax No. 3" and "Color Climax No. 4," as well as "Private No. 8."

On appeal, the United States Court of Appeals for the Ninth Circuit held the seizure of those items not specified in the warrant, including issues of "Color Climax No. 3" and "Color Climax No. 4," to be an unreasonable seizure. The convictions predicated upon those publications were thus reversed. The conspiracy convictions and those convictions based upon "Private No. 8," however, were affirmed.

At the conclusion of the trial, the District Court instructed the jury that the *scienter* required on the part of the Defendants was only knowledge of the "sexual orientation" of the materials shipped. Said instruction was given over the objection of petitioners who each contended that the *scienter* required to be proved was knowledge on their part of the "contents, character and nature" of the materials charged.

On appeal, the Ninth Circuit held that petitioners' proposed language "may have been preferable, but the language used by the district judge is adequate to sustain the conviction."

REASONS FOR GRANTING THE WRIT

I.

A STANDARD OF *SCIENTER* WHICH AUTHORIZES OBSCENITY CONVICTIONS ON MERE KNOWLEDGE OF THE "SEXUAL ORIENTATION" OF MATERIAL IMPERMISSIBLY CHILLS THE DISSEMINATION OF EXPRESSION PROTECTED UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The trial court instructed the jury herein that the prosecution could meet its burden of proof with respect to *scienter* by merely proving that petitioners had knowledge of the "sexual orientation" of the materials charged against them. Both petitioners objected to this instruction and asked that the jury be charged that the government has the burden of proving knowledge on their part of the "contents, character and nature" of the materials in order to establish *scienter.*

Petitioners submit that the instruction on *scienter,* as given by the District Court, fails to meet the constitutional minimum standards of *scienter* set forth by this Court in *Hamling v. United States,* 418 U.S. 87 (1974). As the Court is aware, the principles governing the issue of *scienter* in the area of First Amendment litigation originates with the decision in *Roth v. United States,* 354 U.S. 476 (1957).

In deciding *Roth v. United States, supra,* the Court stated that the obscenity statutes there involved and as construed were not too ambiguous to define a criminal offense. Each of the cases cited to support this ruling, however, stressed the fact that the respective statute involved was directed only at those with guilty knowledge or intent. *See, e.g., United States v. Petrillo,* 332 U.S. 1, 7-8 (1947); *United States v. Harris,* 347 U.S. 612, 624 n. 15 (1954); *Boyce Motor Lines, Inc. v. United States,* 342 U'S. 337, 340 (1952); *United States v. Ragen,* 314 U.S. 513, 523-524 (1942); *United States v. Wurzbach, 280 U.S. 396 (1930); Hygrade Provisions Co. v. Sherman,* 266 U.S. 497 (1925).

The constitutional validity of the obscenity statutes involved in *Roth* rested, therefore, in significant measure upon the understanding that the statutes were not intended to apply to those who distribute material dealing with sex, but

only to those who had knowledge that the particular material distributed was of obscene character and content.

The issue finally was resolved by the decision in *Smith v. California*, 361 U.S. 147 (1959). It was there held that the strict liability feature of the California obscenity ordinance there involved was seriously restricting the circulation of books which were not obscene, "by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold." 361 U.S. at 152. The tendency of the California ordinance, this Court held, was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any *scienter* on his part regarding the book's obscenity." 361 U.S., at 160.

In *Mishkin v. New York*, 383 U.S. 502 (1966), the Court stated:

> "The Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." 383 U.S., at 511.

In approving the authoritative interpretation placed upon the New York obscenity statute by the highest court of the state with respect to the "stringent *scienter* requirement" and "vital element of *scienter*," 383 U.S., at 507, 510 n.5, the Court specifically noted that a parenthetical reference in the Court of Appeals' opinion to "knowledge of the contents of the books" was not to be read as a "modification of this definition of *scienter*." 383 U.S., at 510 n.9.

The most recent decision of this Court on the minimum *scienter* necessary to satisfy the requirements of Due Process and the First Amendment in an obscenity prosecution is *Hamling v. United States*, 418 U.S. 87 (1974). There the Court states:

> "[W]e think the 'knowingly' language of 18 U.S.C. §1462 and the instructions given by the district court in this case satisfy the constitutional requirements of *scienter*. It is constitutionally sufficient that *the prosecution show that a defendant had knowledge of the contents of the material he distributes, and he knew the character and nature of the materials.*" 418 U.S., at 123 (emphasis added).

Thus, the test, as enunciated in *Hamling*, is whether the prosecution shows that a defendant "had knowledge of the contents of the material he distributed, and he knew the character and nature of the materials." The instructions as given below fall far short of that mark by merely putting the prosecution to the proof of whether the defendants knew of the "sexual orientation" of the material rather than proving that they knew the contents, character and nature thereof.

The issue of *scienter* in obscenity prosecution is currently before this Court for plenary review in *Ballew v. Georgia*, No. 76-761, *certiorari* granted January 25, 1977. Oral argument was presented in *Ballew* on November 1, 1977. That case presents for review, among other things, the following questions:

> "Whether jury instructions on *scienter* allowing a finding of constructive knowledge in an obscenity case are sufficient to meet the constitutional mini-

mum standards of *scienter* set forth in *Hamling v. United States*, 418 U.S. 87 (1974)?" Petition for Writ of Certiorari, p.2.

It is clear that any *scienter* requirement merely focusing on knowledge of the sexual orientation of any given material would emasculate the *scienter* requirement in many instances. It could not be seriously contested that many widespread and commonly accepted periodicals such as Playboy are clearly sexually oriented, and the distributors (along with any one who has ever read a copy) know of this orientation. While it is conceivable that juries in some parts of the country might find such periodicals obscene, the *scienter* standard enunciated by the District Court below would essentially eliminate any *scienter*-predicated defense asserted in a prosecution brought against the druggist or grocer who might sell such magazines.

By requiring knowledge of the contents, character and nature of the materials charged, this Court in *Hamling* obviously meant to set a much higher standard of *scienter* than that employed by the District Court below. While it is conceded that petitioners need not have known that the material was obscene in the legal sense, they must at least have known more than that they were sexually oriented.

This Court used three words - - character, contents and nature - - rather than one and there must have been some purpose to serve thereby. If the Court meant to require only knowledge of the sexual orientation, requiring knowledge of the character *or* nature would have been sufficient. But *Hamling* goes on to require knowledge of character *and* nature *and* contents as well. If these extra words are not presumed to be redundant, they must add something to the *scienter requirement incorporated in the instructions below.*

The instructions given below required the jury to find only whether petitioners knew of the sexual orientation of the materials charged. Since this instruction fails to meet the minimum constitutional standards of *scienter*, the convictions must be reversed.

II.

THE INTRODUCTION INTO EVIDENCE OF ILLEGALLY SEIZED PUBLICATIONS PREJUDICED THE JURY HEREIN AND AFFECTED ITS DETERMINATION ON THE ISSUE OF *SCIENTER* AS WELL AS ITS GENERAL DETERMINATION OF OBSCENITY.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the substantive convictions of petitioners predicated upon the interstate transportation of magazines entitled "Color Climax No. 3" and "Color Climax No. 4." The conspiracy conviction of petitioner Sherwin and the substantive convictions of both petitioners predicated upon the transportation of "Private No. 8," however, were affirmed. Petitioners respectfully urge that the introduction at trial of material obtained in the illegal search and seizure recognized by the Court of Appeals necessitates the reversal of all counts.

Petitioners stand convicted in a trial in which concededly illegally seized evidence was introduced. In a delicate area such as that involved here, implicating First Amendment values as it does, the introduction of the illegally seized items was highly prejudicial to petitioners and its most surely affected the jury's overall deliberations, including its ultimate determination of guilt on the counts which were affirmed below.

At the very least, the jury surely considered the illegally seized items in making its determination on the issue of *scienter*. Had the jury been faced with only a single publication such as "Private No. 8" which the Court of Appeals held to have been properly seized, they might well have found the evidence of *scienter* to be lacking. As it was, however, the jury had several publications and could thus easily conclude that petitioners were "in the business" and thus surely possessed of the requisite *scienter*. The jury was instructed that petitioners must merely have been aware of the "sexual orientation" of the materials shipped in order to support a conviction. While the shipment of several sexually oriented publications might support such an inference of knowledge in the minds of the jury, the shipment of a single such magazine does not. It is thus clear that the illegally seized magazines were relevant to the issue of *scienter*.

Further, the illegally seized evidence might well have been utilized by the jury in its overall determination of obscenity. The issues of "Color Climax" contained material much more graphic and perhaps much more personally offensive than that contained in "Private No. 8." It is highly probable that the jury was prejudiced and offended by the material in the illegally seized publications and that this prejudice and offense affected the determination of obscenity with respect to "Private No. 8."

The proper test, pursuant to Title 28, United States Code, §2111, is a determination of "what effect the error had or reasonably may be taken to have had upon the jury's decision." *Kotteakos v. United States*, 328 U.S. 750, 764 (1946). As this Court stated in that case:

> "The inquiry cannot be merely whether there was enough to support the result, apart from the

> phase effected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." 328 U.S., at 765.

In this case, it is clear that, at the very least one is left in grave doubt as to whether or not the illegally seized evidence influenced the jury's verdict. First, the illegally seized publications were possessed of a high potential to inflame and prejudice the jury. Such publications contained, *inter alia*, pictures of women engaged in oral and vaginal sex acts with horses and pigs. No such grotesque representations were contained in "Private No. 8," but it is unlikely that any juror viewing the illegally seized magazine could help but be influenced thereby in a general determination of petitioner's culpability or in the determination of obscenity as a whole.

Further, the introduction of the illegally seized magazines must surely have effected the jury determination of *scienter* in at least two ways. First, because of the grotesque and perverse sexual acts depicted therein, the jury must surely have looked upon petitioners as hardened and experienced purveyors of the worst sort, and thus surely possessed of the requisite *scienter*. Second, the fact that more than one publication was involved, almost surely influenced the jury determination on the sophistication of petitioners as distributors of sexually explicit material.

Applying the test from *Kotteakos, supra*, the Court can not say that, "when all is said and done, the conviction is sure that the error did not influence the jury, or had a very slight effect." 328 U.S., at 764. The convictions which the Court of Appeals affirmed should be therefore vacated and remanded for a new trial in which the illegally seized evidence is excluded.

CONCLUSION

For all of the above reasons Petitioners' convictions should be reversed.

Respectfully submitted,

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APPENDIX "A"

(Filed October 21, 1977)

Appeal from the United States District Court for the Central District of California (Before: WRIGHT and KENNEDY, Circuit Judges, and SCHWARTZ, District Judge)

Sherwin and Coryell were convicted of seven counts of interstate shipment of obscene materials for sale or distribution in violation of 18 U.S.C. §§1462 and 1465.[1] Sherwin was also convicted of conspiracy to use a common carrier for interstate transportation of obscene matter.[2]

Coryell shipped magazines and playing cards to Sherwin, as Superhawk Industries, in Van Nuys, California. When the consignment arrived and was unloaded, FBI agents who had known the shipment was en route obtained search warrants and searched two Superhawk locations. Among the items seized was a variety of sexually explicit erotica.

At trial Sherwin moved to suppress certain evidence seized, alleging that the search warrants were issued without probable cause and that some seized items were not described in the warrants. The motion was denied.

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[1] Defendant-appellants were originally charged with 31 counts. Counts 2 to 31 charged violations of 18 U.S.C. §§ 1462 and 1465. They were convicted on counts 5, 6, 7, 17, 18, 19, and 22.

[2] Count 1 of the indictment.

Over defense objection, the district court instructed the jury that the scienter required on the part of the defendants was only knowledge of the "sexual orientation" of the materials shipped.

On appeal two arguments were made: (1) that the court erred in denying the motion to suppress, and (2) that it erred in instructing the jury on the issue of scienter. We affirm in part and reverse in part.

I.

THE MOTION TO SUPPRESS

A. *Sufficiency of the Search Warrant Affidavits.*

Appellants contend that the affidavits relied on by the magistrate in issuing the search warrants were insufficient to provide probable cause to believe that any crime was being committed because they gave no reason to believe that the materials shipped to Van Nuys were obscene.

This is a sensitive area. More than once the Supreme Court has struck down search warrants based on an officer's conclusory allegation that, after viewing the materials, he found them to be obscene. *E.g., Roaden v. Kentucky*, 413 U.S. 496 (1973); *Lee Art Theater v. Virginia*, 392 U.S. 636 (1968).

In this case, however, the affidavit used to obtain the search warrant contained more than conclusory allegations of obscenity. Specifically, it stated that the coming shipments of explicit magazines, including "Private No. 8," contained color photographs of:

> completely nude males and females engaging in various sexual activities, including sexual intercourse, cunnilingus, oral copulation and other sexually explicit acts. . .

The firmly established rule is that the warrant must stand or fall solely on the contents of the affidavit if it is the only matter presented to the issuing magistrate. *United States v. Melvin*, 419 F.2d 136 (4th Cir. 1969).

The description in the agent's affidavit was sufficient to allow the magistrate to make his own determination of probable cause. The affidavit was more than a mere conclusion on the agent's part. It gave specific facts as to the magazine's contents.[3] According the judicial determination the "great deference" it is due by reviewing courts, *Spinelli v. United States*, 393 U.S. 410, 419 (1969), the issuance of the warrant was proper.

B. *Execution of the Search Warrants.*

One of the two search warrants under which the agents operated in this case authorized the seizure of a "sexually explicit magazine, entitled 'Private No. 8' " from an address on Burnet Avenue, Van Nuys, California. Although this was the

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[3] In *United States v. Pryba*, 502 F.2d 391 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1127 (1975), the court upheld the sufficiency of a search warrant affidavit with this descriptive language:

> "The. . . films depict a man and a female engaged in sexual intercourse, [and] various other sexual activities by males and males [and] males and females."

only publication referred to in the search warrant, the agents also seized the following publications at that address:

3 copies of "Private No. 7"
3 copies of "Private No. 11"
3 copies of "Color Climax No. 1"
3 copies of "Color Climax No. 2"
3 copies of "Color Climax No. 3"
3 copies of "Color Climax No. 4"
3 copies of "Homosexual Boys."

"Private No. 8" and "Color Climax No. 3 and No. 4" were the bases of the counts on which appellants were later convicted and sentenced.

The government argues that seizure of the magazines not identified in the search warrant was proper under either the "nexus" or "plain view" exceptions to the general Fourth Amendment prohibition against unreasonable searches and seizures. Both exceptions have been recognized in this circuit. *Louie v. United States*, 426 F.2d 1398 (9th Cir.), *cert. denied*, 400 U.S. 918 (1970); *United States v. Damitz*, 495 F.2d 50 (9th Cir. 1974).

Appellants argue, however, that these exceptions to the warrant requirement are not applicable here when the materials seized are arguably protected by the First Amendment. We agree.

The Supreme Court cases of *Roaden v. Kentucky*, 413 U.S. 496 (1973), *Lee Art Threater v. Virginia*, 392 U.S. 636 (1968), and *Marcus v. Search Warrant of Property*, 367 U.S. 717 (1961), lead us to this conclusion. In those cases the Court struck down the seizure of films and books because

there was no step in the procedures of each case prior to the seizures designed to focus searchingly on the question of obscenity.

There were two fatal flaws in the procedure disapproved in *Marcus v. Search Warrant, supra*, for example. Not only were the search warrants issued on the conclusory opinion of a police officer that the publications sought to be seized were obscene but, in addition, the broad authority given the police officer under the warrants to seize "obscene . . . publications" impermissibly allowed each officer to make an *ad hoc* determination of obscenity at the site of the seizure. 367 U.S. at 731-32.

The Court noted that the warrants in *Marcus* posed problems not "raised by the warrants to seize 'gambling implements' and 'all intoxicating liquors'." *Id.* at 731. This thought was later echoed in *Roaden* where the Court stated:

> The seizure of instruments of a crime, such as a pistol or a knife, or "contraband or stolen goods or objects dangerous in themselves, are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth. . . Amendment standards.

413 U.S. at 502.

In *Roaden* it was not enough that a copy of the allegedly obscene film was seized *incident to the arrest* of the theater manager. As the Court noted:

> The Fourth Amendment proscription against "unreasonable. . . seizures" . . ., must not be read in a vacuum. A seizure reasonable as to one type of

> material in one setting may be unreasonable in a different setting or with respect to another kind of material.

Id. at 501.

As one commentator stated about *Roaden:* "The Court assumed that with respect to garden variety contraband, such a seizure would have been valid."[4] We are not dealing with garden variety contraband in this case, however. Because of the First Amendment, the seizure of all publications must meet higher procedural standards than normal. As noted by the Court:

> . . .[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . . [T]he separation of legitimate from unlegitimate speech calls for. . . sensitive tools. . . .

Speiser v. Randall, 357 U.S. 513, 525 quoted in *Marcus,* 367 U.S. at 731.

The Court reiterated its point years later in *Roaden:*

> As we stated in *Stanford v. Texas* [379 U.S. 476, 485 (1965)]:

[4] Letwin, "Regulation of Underground Newspapers on Public School Campuses in California," 22 U.C.L.A. L. Rev. 141, 172 (1974).

> "In short, . . . the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. . . No less a standard could be faithful to the First Amendment freedoms. . ."

413 U.S. at 504 (citations omitted).

The importance of protecting First Amendment freedoms precludes police officers from making *ad hoc* determinations at the scene as to which materials are probably obscene. *See United States v. Kelly,* 529 F.2d 1365 (8th Cir. 1976). Neither the "nexus" or "plain view" doctrines, therefore, provide a justification for the seizure of publications not identified in the warrant. The use of these doctrines implies, *a fortiori,* that the officer, although legally on the premises to search, made the initial determination of probable obscenity rather than having it made by a magistrate or other judicial officer. The Supreme Court cases forbid this.

A preferable and less intrusive method would be for the officers to seal the area to prevent destruction of any publications while they obtained another warrant. This procedure has been used and approved in the context of an obscenity investigation.[5]

[5] This procedure was approved in *G.I. Distributors, Inc. v. Murphy,* 490 F.2d 1167 (2nd Cir. 1973). There, police had search warrants authorizing the seizure of six copies of 56 magazines which were allegedly obscene. When they went to the warehouse of G.I. Distributors, they discovered 19,000 additional copies of the same magazines.

The fact that the agents took only samples and did not confiscate all cartons of the magazines does not solve the underlying problem that a magistrate failed to "focus searchingly on the question of obscenity" prior to the seizure of all the magazine sample copies but "Private No. 8." As stated by the Eighth Circuit when responding to the government contention that the seizure was reasonable because only sample copies were taken:

> We find this distinction untenable, however, and inconsistent with the thrust of recent Supreme Court decisions. See *Roaden v. Kentucky*, 413 U.S. 496, 501-06 (1973). A contrary conclusion would reduce First Amendment materials such as books and magazines to lesser rather than greater adherence to the warrant requirement of the Fourth Amendment.

Kelly, supra, 529 F.2d at 1373.

Footnote [5] Continued:

> "The police did not destroy the material, transport it, or apparently even interfere with the owners' access to it. They merely prevented the owners from moving the magazines for the period. . . The courts have often advised police that when they have no warrant for a search or seizure, the proper course is to watch the item under suspicion in order to prevent it from being moved, during which time the search warrant can be obtained."

Id. at 1170. Although the issue in *G.I. Distributors* differs from that in this case and the factual pattern is distinguishable, the procedure used is equally applicable. *(G.I. Distributors* considered whether temporary sequestration of allegedly obscene magazines before an adversary hearing to determine the questions of obscenity was unconstitutional.)

We conclude that prior restraint of the right to expression demands a stricter evaluation of reasonableness. In the absence of exigent circumstances,[6] seizure of First Amendment materials should observe traditional constitutional safeguards and allow a judge to focus searchingly on the question of obscenity before seizure.

The convictions based on "Private No. 8" are affirmed because proper procedures were followed prior to its seizure. Because the officers exceeded the scope of the warrant in seizing other undescribed written material, the convictions on those counts are reversed.[7]

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[6] We do not find exigent circumstances in this record and do not decide that issue. It does appear, however, that the outcome would be different if exigent circumstances were present. As stated by the Court: "Where there are exigent circumstances in which police action literally must be 'Now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation." *Roaden v. Kentucky*, 413 U.S. at 505.

[7] The issue we now decide was not presented in *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976) (en banc). There a terminal inspector turned over to FBI agents two books from a damaged carton which he believed to be obscene. After an independent determination that the books were probably obscene, the magistrate issued a search warrant. In executing it, however, he had the 17 cartons of books delivered to him. The search, executed in his presence, turned up additional books, three of which were among the four titles in the subsequent indictment.

On appeal from their conviction, appellants raised the issue of whether they had a right to an adversary hearing before seizure of the allegedly obscene publications. We held that, as long as a neutral magistrate personally examined the books

II.

JURY INSTRUCTIONS

At trial, the district court instructed the jury that the scienter required of the defendants was only knowledge of the "sexual orientation" of the materials shipped. Defendants objected to the instruction and asked that the jury be charged that the government had the burden of proving knowledge on the part of the defendants of the "contents, character and nature" of the materials in order to establish scienter.

They relied on language in *Hamling v. United States*, 418 U.S. 87, 123 (1974), which stated that it was "constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." In *Hamling*, however, the Court also specifically approved the instructions given by the district court in the case.

Footnote [7] Continued:

and independently determined probable cause for obscenity, the procedure was proper, so long as a prompt adversary hearing was available on request.

The issue of whether the books found unexpectedly when the cartons were opened were properly seized was not raised. Even if their seizure could be justified on the grounds that the magistrate was present the moment the cartons were opened, or because the agents had no intention of seizing more than the original two books brought to their attention by the terminal inspector, there is no similar justification for the seizure of the additional magazines in the present case.

> . . . [T]he District Court instructed the jury, *inter alia*, that in order to prove specific intent on the part of these petitioners, the Government had to demonstrate that petitioners "knew the envelopes and packages containing the subject materials were mailed or placed. . . in Interstate Commerce, and . . . that they had knowledge of the character of the materials."

418 U.S. at 119-120.

These instructions required only the defendants be aware of the *character of the materials*. Another circuit has equated this requirement with a "general knowledge that the material is sexually oriented." *United States v. Linetsky*, 533 F.2d 192, 204 (5th Cir. 1976).

In light of the Court's approval of the district court's instructions in *Hamling* and the Fifth Circuit's decision in *Linetsky*, we conclude that the instruction of the district judge was sufficient. Defendants' proposed instruction using the language of *Hamling* concerning the "contents, nature and character of the materials," may have been preferable but the language used by the district judge is adequate to sustain the conviction.

CONCLUSION

The convictions on counts 5, 6, and 7, based on "Private No. 8," are affirmed. Count 1, the conspiracy count on which Sherwin was convicted, is also affirmed. Because the magistrate did not make an independent factual determination about the probable obscenity of "Color Climax No. 3 and No. 4," counts 17, 18, 19, and 22 are reversed. The fines imposed as to counts 17 and 22 are vacated, and the cases are remanded for resentencing.

APPENDIX "B"

(Filed January 24, 1978)

Before: WRIGHT and KENNEDY, Circuit Judges, and SCHWARTZ, District Judge.

The panel as constituted in the above case has voted to deny the appellants' petition for rehearing. Judges Wright and Kennedy have voted to reject the appellants' suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.
